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No. 83-

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1983

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RICHARD BOULIN,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether a person licensed under 18 U.S.C. 923 to engage in the business of dealing in firearms only at the premises specified in the license may, if he sells firearms which were never part of his business inventory, at a different premises, be convicted of failing to record the firearms sales as over-the-counter sales made from his business inventory at his business premises and also for failure to record the sales as mail order sales made from his business inventory at his business premises.

2. Whether a search warrant which commands the seizure of "firearms, ammunition and records involved in, used in or intended to be used in violation of Title 18 U.S.C. Section 922(m) and 922(c)" is sufficiently particular to satisfy the requirements of the Fourth Amendment.

3. Whether an individual may be prosecuted by the United States for conduct which an agent of the United States had previously advised him was permissible.

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## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATUTES INVOLVED

Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968, 18 U.S.C. 921 *et seq.*, provides in pertinent part:

18 U.S.C. 921. **Definitions**

(a) As used in this chapter—

* * * *

(11) The term "dealer" means (A) any person engaged in the business of selling firearms or ammunition at wholesale or retail. . . .

18 U.S.C. 922. **Unlawful Acts**

(a) It shall be unlawful—

(1) for any person, except a . . . licensed dealer, to engage in the business of . . . dealing in firearms or ammuntion. . .

* * * *

(c) In any case not otherwise prohibited by this chapter, a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if—

(1) the transferee submits to the transferor a sworn statement in the following form:

> "Subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age, or that, in the case of a shotgun or a rifle, I am eighteen years or more of age; that I am not prohibited by the provisions of chapter 44 of title 18, United States Code, from receiving a firearm in interstate or foreign commerce; and that my receipt of this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside. Further, the true title, name, and address of the principal law enforcement officer of the locality to which the firearm will be delivered are ——————————— Signature ——————— Date ———————."

and containing blank spaces for the attachment of a true copy of any permit or other information required pursuant to such statute or published ordinance;

(2) the transferor has, prior to the shipment or delivery of the firearm, forwarded by registered or certified mail (return receipt requested) a copy of the sworn statement, together with a description of the firearm, in a form prescribed by the Secretary, to the chief law enforcement officer of the transferee's place of residence, and has received a return receipt evidencing delivery of the statement or has had the statement returned due to the refusal of the named addressee to accept such letter in accordance with United States Post Office Department regulations; and

(3) the transferor has delayed shipment or delivery for a period of at least seven days following receipt of the notification of the acceptance or refusal of delivery of the statement.

A copy of the sworn statement and a copy of the notification to the local law enforcement officer, together with

evidence of receipt or rejection of that notification shall be retained by the licensee as part of the records required to be kept under section 923(g).

* * * *

(m) It shall be unlawful for any . . . licensed dealer . . . knowingly . . . to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

* * * *

18 U.S.C. 923. **Licensing**

(a) No person shall engage in business as a firearms . . . dealer until he has filed an application with, and received a license to do so from, the Secretary. . . . Each applicant shall pay a fee for obtaining such a license, a separate fee being required for each place in which the applicant is to do business. . .

(d) (1) Any application submitted under subsection (a) or (b) of this section shall be approved if—

* * * *

(E) the applicant has in a State (i) premises from which he conducts business subject to license under this chapter or from which he intends to conduct such business within a reasonable period of time. . .

* * * *

(g) Each . . . licensed dealer . . . shall maintain such records of importation, . . shipment, receipt, sale, or other disposition, of firearms and ammunition at such place, for such period, and in such form as the Secretary may by regulations prescribe. Such . . . dealers . . . shall make such records available for inspection at all reasonable times. . . . The Secretary may enter during business hours the premises (including place of storage) of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining (1) any records or documents required to be kept by such . . . dealer . . . under the provisions of

this chapter or regulations issued under this chapter, and (2) any firearms or ammunition kept or stored by such . . . dealer . . . at such premises. . .

(h) Licenses issued under the provisions of . . . this section shall be kept posted and kept available for inspection on the premises covered by the license.

• • • •

18 U.S.C. 924. **Penalties**

(d) Any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture. . .

• • • •

18 U.S.C. 926. **Rules and regulations**

The Secretary may prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter. . .

## REGULATIONS AND RULINGS INVOLVED

Regulations prescribed pursuant to 18 U.S.C. 926 provide in pertinent part:

27 C.F.R. 178.41 **General**

• • • •

(b) Each person intending to engage in business as a firearms . . . dealer shall file an application, with the required fee. . . . A separate license must be obtained for each business and each place at which the applicant is to do business. Such license shall . . . entitle the licensee to transport, ship, and receive firearms and ammunition covered by such license in interstate or foreign commerce, and to engage in the business specified by the license, at the location described on the license. . .

• • • •

27 C.F.R. 178.50 **Locations covered by license**

The license covers the class of business or the activity specified in the license at the address described therein. Accordingly, a separate license must be obtained for each location at which a firearms or ammunition business or activity requiring a license under this part is conducted; however, no license is required to cover a separate warehouse used by the licensee solely for storage of firarms or ammunition if the records required by this part are maintained at the licensed premises served by such warehouse. . .

27 C.F.R. 178.96 **Out-of-State and mail order sales**

(a) The provisions of this section shall apply in any case where a firearm purchased by or delivered to the person so receiving the firearm is not otherwise prohibited by the Act or this part.

(b) A . . . licensed dealer may sell a firearm to a nonlicensee who does not appear in person at the licensee's business premises if the nonlicensee is a resident of the same State in which the licensee's business premises are located, and the nonlicensee furnishes to the licensee the firearms transaction record, Form 4473, required by ¶ 178.124. The nonlicensee shall attach to such record a true copy of any permit or other information required pursuant to any statute of the State and published ordinance applicable to the locality in which he resides. The licensee shall prior to shipment or delivery of the firearm, forward by registered or certified mail (return receipt requested) a copy of the record, Form 4473, to the chief law enforcement officer named on such record, and delay shipment or delivery of the firearm for a period of at least 7 days following receipt by the licensee of the return receipt evidencing delivery of the copy of the record to such chief law enforcement officer, or the return of the copy of the record to him due to the refusal of such chief law enforcement officer to accept same in accordance with U.S. Postal Service regulations. . .

27 C.F.R. 178.124 **Firearms transaction record**

* * * *

(a) A . . . licensed dealer shall not sell or otherwise dispose, temporarily or permanently, of any firearm to any person, other than another licensee, . . . unless he records the transaction on a firearms transaction record, Form 4473:

* * * *

(c) Prior to making an over-the-counter transfer of a firearm to a nonlicensee who is a resident of the State in which the licensee maintains his business . . . premises, the . . . licensed dealer . . . so transferring the firearm shall obtain a Form 4473 from the transferee showing the name, address, date and place of birth, height, weight, and race of the transferee, and certification by the transferee that he is not prohibited by the Act or Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 (82 Stat. 236; 18 U.S.C. Appendix) from receiving a firearm in interstate or foreign commerce. The licensee shall identify the firearm to be transferred by listing in the Form 4473 the name of the manufacturer, the name of the importer (if any), the type, model, caliber or gauge, and the serial number of the firearm. Before transferring the firearm described in the Form 4473, the licensee (1) shall cause the transferee to identify himself in any manner customarily used in commercial transactions (e.g., a driver's license), and shall note on the form the method used, and (2) if satisfied that the transferee is lawfully entitled to receive the firearm, shall sign and date the form.

* * * *

27 C.F.R. 178.125 **Record of receipt and disposition**

* * * *

(e) ***Firearms receipt and disposition.*** Each licensed dealer . . . shall on and after the effective date of this part enter into a permanent record each receipt and disposition of firearms. . . . The record required by this

paragraph shall be maintained in bound form. . . The record shall show the date of receipt, the name and address or the name and license number of the person from whom received, the name of the manufacturer and importer (if any), the model, serial number, type of action, and the caliber or gauge of the firearm. . . . The sale or other disposition of a firearm . . . shall be recorded by the licensed dealer . . . not later than seven days following the date of such transaction. When such disposition is made to a nonlicensee, the firearms transaction record, Form 4473, obtained by the licensed dealer . . . shall be retained, until the transaction is recorded, separate from his Form 4473 file and be readily available for inspection.

**your 1977 guide to—Firearms Regulation, Bureau of Alcohol, Tobacco and Firearms, Questions and Answers Pertaining to Federal Firearms Laws and Regulations:**

**(33) Is a Form 4473 needed in the private sale of firearms by a nonlicensee?**

No. Form 4473 is required only for sales by a licensee. (178.124)

**(34) Does a dealer have to execute Form 4473 to take a weapon out of his saleable inventory for his own use?**

Yes, such a transfer is treated as any other transfer to a nonlicensed person. (178.124)

* * * *

**(59) May firearms and ammunition be sold at a gun show?**

Yes, within the following framework, provided local ordinances are not violated and excepting NFA weapons.

A LICENSED FIREARMS DEALER MAY:

1. Display and take orders for firearms and ammunition. Orders must be filled only at the dealer's licensed premises. . . .

A NONLICENSED RESIDENT OF THE STATE IN WHICH THE SHOW IS BEING HELD MAY:

1. Make an occasional sale of a firearm to another nonlicensee residing in his State (as long as he is not "engaging in the business.")...

**Revenue Ruling 69-59** states, in pertinent part:

> ... Under 18 U.S.C. 923(a), "a separate fee" is required to be paid for each place at which business as a licensee is to be conducted. Further, each applicant for a license is required to have in a State "premises from which he conducts business" (18 U.S.C. 923(d)(1)(E)) and to specify such premises in the license application. In addition, records are required to be maintained at the business premises covered by the license (18 U.S.C. 923(g)).
>
> Therefore, a person holding a valid license may engage in the business covered by the license only at the specific business premises for which his license has been obtained. Thus, a licensee may not sell firearms or ammunition at a gun show held on premises other than those covered by his license.

**Industry Circular 72-30** provides:

**Identifying personal firearms**

**Guidelines for Identifying Personal Firearms on the Business Premises of Licensed Dealers.** A presumption exists that all firearms on a business premises are for sale and accordingly must be entered in the records required to be maintained under the law and regulations. However, it is recognized that some dealers may have personal firearms on their business premises for purposes of display or decoration and not for sale. Firearms dealers who have such personal firearms on licensed premises should not intermingle such firearms with firearms held for sale. Such firearms should be segregated from firearms held for sale and appropriately identified (for example, by attaching a tag) as being "not for sale". Personal firearms

on licensed premises which are segregated from firearms held for sale and which are appropriately identified as not being for sale need not be entered in the dealers records.

There may be occasions where a firearms dealer utilizes his license to acquire firearms for his personal collection. Such firearms must be entered in his permanent acquisition records and subsequently be recorded as a disposition to himself in his private capacity. Form 4473 shall be prepared and executed for these transactions. If such personal firearms remain on the licensed premises, the procedures described above with respect to segregation and identification must be followed.

The above procedures will facilitate the examination and inspection of the records of firearms dealers and result in less inconvenience to licensees.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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No. 83-

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RICHARD BOULIN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Richard Boulin petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

### OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, 1a-10a) is unreported. The opinion of the district court (App. F, *infra*, 23a-26a) finding Petitioner guilty on stipulated facts is also unreported.

### JURISDICTION

The judgment of the court of appeals was entered on April 12, 1983 and a timely petition for rehearing, with a suggestion for rehearing *en banc*, was denied on July 15, 1983 (App. B, *infra*, 11a-12a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

On September 25, 1977, the Petitioner, a resident of Maryland, set up a table at the J & S Wildcat Gun Show in the Baltimore Civic Center, Baltimore, Maryland, displayed firearms for sale, and sold and transferred three firearms, which he then owned, to Gordon William Schoen, also a Maryland resident. On October 1, 1977, Petitioner set up a table at the Greenbelt Gun Show, in the Greenbelt National Guard Armory, Greenbelt, Maryland, displayed firearms for sale, and sold and transferred one of his firearms to Schoen. On November 5, 1977, Petitioner set up a table at the Greenbelt Gun Show in the Greenbelt National Guard Armory, displayed firearms for sale, and sold and transferred a fifth firearm to Schoen.[1] (App. H, *infra*, 36a-41a)

At the time he sold the firearms at the Baltimore Civic Center and at the Greenbelt National Guard Armory, Petitioner did not have a license to engage in the business of dealing in firearms at either premises, as required by 18 U.S.C. 923, nor had he applied for such a license for either premises. (App. H, *infra*, 39a)

Petitioner did, however, have a license issued by the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms (BATF) which authorized him to engage in the business of dealing in firearms only at 9112 Penn-

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[1] The firearms sold at the Baltimore Civic Center were: a Lugar 9mm semi-automatic pistol, a Colt .25 caliber semi-automatic pistol and a Browning .22 caliber semi-automatic rifle. At the first Greenbelt National Guard Armory show, a Colt .357 magnum caliber revolver was sold; at the second show, a Colt Python .357 magnum revolver was sold. The indictment, as returned, also contained charges, in Counts 5, 6 and 13, based on the sales of a Smith & Wesson revolver and a High Standard pistol to Schoen on October 1, 1977, in the Greenbelt National Guard Armory. These three counts were dismissed on motion of the Government. The case, as submitted to the District Court on facts stipulated by the government and the defendant, concerned the sales of only five firearms. (App. H, *infra*, 36a-41a)

sylvania Avenue, Silver Spring, Maryland. (App. H, *infra*, 37a). With the consent of that Bureau, and as permitted by 27 C.F.R. 178.50, Petitioner stored his inventory of firearms for his licensed business, known as Commemoratives Unlimited, at 8700 Hawkins Creamery Road, Gaithersburg, Maryland, his home address. (App. O, *infra*, 67a-68a). In connection with his firearms business, Petitioner maintained a Dealers' Firearms Record Book to record the identities of the firearms acquired by and disposed of by his business. The five firearms stipulated as having been sold to Schoen were not entered in his Dealers' Firearms Record Book, having never been acquired by Petitioner's business. At no time did Schoen ever appear at the business premises where Petitioner was authorized by his federal license to do business. (App. H, *infra*, 39a-40a).

After each sale of firearms by Petitioner to Schoen, the latter delivered the purchased firearms to Special Agent William J. McMonagle of the BATF. (App. H, *infra*, 37a-38a). On December 12, 1977, based upon an affidavit submitted by that agent, a United States Magistrate issued two search warrants. One commanded the search of the premises at which Petitioner was licensed to conduct his firearms business and the other commanded a search of Petitioner's home. Each warrant recited the Magistrate's satisfaction that there was probable cause to search both places and seize certain property identified only as "firearms, ammunition and records involved in, used in or intended to be used in violation of Title 18 U.S.C. Section 922(m) and 922(c)."

Special Agent McMonagle's affidavit recounted the purchase of seven firearms at the gun shows, made under his guidance and control by Schoen from Petitioner, who had identified himself as a federally licensed firearms dealer trading as Commemoratives Unlimited, 9112 Pennsylvania Avenue, Silver Spring, Maryland. McMonagle stated that with Schoen's consent, all the aforemen-

tioned transactions were monitored and recorded by McMonagle by means of an electronic device placed on Schoen's person, but that due to technical difficulties, portions of each transaction were inaudible. (App. J, *infra*, 52a-55a)

McMonagle's affidavit then recited:

> On or about December 6, 1977, Gordon William Schoen stated to your affiant that during some but not all of the aforementioned firearms transactions, he completed some federal firearms forms. However, Mr. Schoen was not sure of just how many forms he completed.
>
> On December 7, 1977, Gordon William Schoen stated to your affiant that on December 6, 1977, he telephoned Richard Boulin at 253-6133 and told him that on Wednesday, December 14, 1977, he (Schoen) would be in the market to buy more firearms "off paper." According to Mr. Schoen, Mr. Boulin said that he would sell Mr. Schoen numerous firearms the same way he did before (referring to selling them without paperwork). Boulin said that the guns are presently being stored at his residence, 8700 Hawkins Creamery Road, Gaithersburg, Maryland, and that they would be there on Wednesday, December 14, 1977, when Schoen went there to buy them. Mr. Boulin then proceeded to give Mr. Schoen directions to his (Boulin's) residence at 8700 Hawkins Creamery Road, Gaithersburg, Maryland.

The following was added as a footnote at the end of the affidavit:

> Subsequent to each controlled purchase of firearms Gordon William Schoen stated to your affiant that during the purchase of said firearms, he did not execute any sworn statements as prescribed by the (sic) Title 18 U.S.C. Section 922(c).

Unlike the three prior attempts at electronic monitoring, the December 6, 1977 telephone conversation between Schoen and Boulin had been very successfully recorded, by special Agent McMonagle. (App. Q, *infra*, 74a-82a)

On December 14, 1977, Special Agents of the BATF executed the search warrants for Petitioner's business premises and residence. Nothing was seized at the business premises but at Petitioner's residence the agents seized 83 firearms, 5,765 rounds of ammunition, and various firearms records, including Petitioner's Dealers' Firearms Record Book, Dealers' Ammunition Record Book and a Personal Weapons Transaction Log.[2] (App. G, *infra*, 27a-28a)

The Grand Jury for the District of Maryland returned a thirteen count indictment against Petitioner on December 20, 1977. Count One charged:

> On or about the 25th day of September, 1977, in the State and District of Maryland, RICHARD BOULIN being a licensed dealer in firearms, knowingly failed to comply with the requirements of Title 18, United States Code, Section 922(c) in connection with the sale of a firearm, that is, one 9mm Lugar semi-automatic pistol, serial number on barrel 7318, on frame 4907, to a person (who was not a licensed importer, manufacturer, or dealer of firearms) who did not appear in person at his licensed business premises.[3]

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[2] The Personal Weapons Transactions Log was not required to be maintained by regulations prescribed pursuant to the Gun Control Act and therefore not governed by the provisions of 18 U.S.C. 922(m). 27 C.F.R. 178.124 and 178.125 specify the records which are required to be maintained by a licensed dealer.

[3] The requirements of 18 U.S.C. 922(c) are complied with by a dealer when he and the transferee of a firearm execute Part II of Form 4473, entitled "Firearms Transaction Record." 27 C.F.R. 178.96 (App. N, *infra*, 65a) Part II of Form 4473 is labeled as being for "Contiguous State or Non-Over-The-Counter" sales or transfers. Section A must be completed by the transferee (buyer) and Section B must be completed by the transferor (seller). The instructions on the reverse side of the Form state that the "form should not be used for sales or transfers when neither person is licensed under" the Gun Control Act. "Non-Over-The-Counter Transaction" is defined in the instructions as a "*mail order trans-*

The language in Counts 2, 3, 4 and 7 is identical to Count One except that the sales charged were of the other four firearms mentioned in the stipulation.

Count Eight of the Indictment charged:

> On or about the 25th day of September, 1977, in the State and District of Maryland, RICHARD BOULIN being a Federally Licensed Firearms Dealer did knowingly and unlawfully fail to maintain records which are required to be kept pursuant to 18 U.S.C. 923 and 27 C.F.R. ¶ 178.124(a) in that he sold and disposed of one 9 mm Lugar semi-automatic pistol, serial number on barrel 7318, on frame 4907, to a nonlicensee without recording said transaction on a firearms transaction record, Form 4473.[4]

The language in counts nine through twelve is identical except that the sales charged were of the other four firearms stipulated as having been sold by Petitioner to Schoen.

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*action* to a resident of the State in which the transferor's (seller's) premises are located." (emphasis added) (App. N, *infra*, 66a). Printed in Section A is an affidavit containing the language specified in 18 U.S.C. 922(c).

[4] Form 4473 is entitled "Firearms Transaction Record." Part I is labeled as being for "Intrastate-Over-The-Counter" sales or transfers. Section A of Part I must be completed by the transferee (buyer) and Section B must be completed by the transferor (seller). (App. M, *infra*, 63a) The instructions on the reverse side of the form state that "this form should not be used for sales or transfers where neither person is licensed under" the Gun Control Act. "Intrastate-Over-The-Counter Transaction" is defined as the "sale or other disposition of a firearm by the transferor (seller) to a transferee (buyer), who is a resident of the state in which the transferor's business is located, *occurring on the transferor's business premises*." (emphasis added) (App. M, *infra*, 64a). 27 C.F.R. 178.124(c), requiring the execution of Form 4473 for over-the-counter transfers, was cited below the charging paragraphs of Counts Eight through Twelve. 27 C.F.R. 178.124(a) is a general requirement that Form 4473 be prepared for any sale or other disposition of a firearm.

On January 13, 1978, Petitioner moved, under Rule 41(e) of the Federal Rules of Criminal Procedure, for the return of all property seized and under Rule 12 for suppression of the use of such property as evidence at trial. The District Court heard testimony on the motions on April 7, June 9, and June 19, 1978; on July 31, 1978, it denied the motions. The Court said it was adopting the reasoning of *United States v. Scherer*, 523 F.2d 371 (7th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976), in rejecting Petitioner's contention that it was not necessary that he record these sales since they were of firearms from his personal collection, as distinguished from his business inventory, as recorded in his Dealers' Firearms Record Book. (App. G, *infra*, 32a-33a)

In answering Petitioner's argument that the mere fact that he sold five guns from his personal collection is insufficient to establish that he intended to sell guns illegally in the future, the Court relied on the affidavit of McMonagle, which in turn relied on Schoen's statement that during his telephone conversation of December 6, 1977 with Petitioner, he told Petitioner that he would be in the market to buy more firearms "off paper" and that Petitioner agreed to sell numerous firearms "the same way he did before." According to McMonagle's affidavit, the words "the same way he did before" constituted a reference to selling them without paperwork.[5] The Court also rejected Petitioner's claim that the items to be seized were not described in the warrant with sufficient particularity, citing *Scherer, supra.* (App. G, *infra*, 34a-35a).

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[5] McMonagle admitted during his testimony at the suppression hearing on June 9, 1977, that the transcript of this telephone conversation (App. Q, *infra*, 74a-82a) reflected that Schoen did not make the statement that he would be in the market to buy more firearms "off paper". He said the affidavit reflected what Schoen told him and that he, McMonagle, had not read the transcript of the telephone conversation at the time he executed the affidavit. (App. P, *infra*, 71a-73a)

On October 10, 1979, based on the stipulated facts in the case, District Judge Herbert L. Murray found Petitioner guilty on all remaining counts of the indictment, again relying on *Scherer* in rejecting Petitioner's contention that he was not required, in connection with the sales of the firearms at the Baltimore Civic Center and the Greenbelt National Guard Armory, to create the records specified in 18 U.S.C. 922(c) and prescribed regulations. (App. E, F, *infra*, 22a-26a)

On February 12, 1980, Petitioner filed a Petition for a Writ of Error Coram Nobis. He reiterated what he had previously testified to during the hearing on his motion to suppress, that he had been advised by an Inspector of the BATF, prior to the sales upon which his conviction was based, that when he made private sales of his personal firearms to residents of Maryland, he need not comply with the recording requirements of the Gun Control Act and regulations prescribed pursuant thereto. Petitioner also pointed out that the Government had never disputed that Petitioner had been given this advice, nor even addressed the subject. Petitioner then called to the Court's attention a letter dated July 30, 1979, to Senator S. I. Hayakawa, from the then Acting Director of the BATF, John C. Krogman (App. K, *infra*, 56a-61a) which stated, *inter alia*:

> ATF recognizes that a licensee may maintain a private collection of firearms independent of the business inventory and lawfully dispose of such firearms without entering the transaction in the licensee records.

Mr. Krogman's letter then discussed the requirements of Industry Circular 72-30, which recognizes the distinction between personal firearms and firearms held for sale on the licensee's business premises, and concluded by stating that the "licensee's subsequent sale of such personal firearms need not be recorded in the business records and a Form 4473 executed by the purchaser would not be required." Petitioner stressed that Mr. Krogman's letter

confirmed that ATF inspectors had correctly advised Petitioner. Petitioner then argued that the Government's failure to acknowledge BATF's interpretation should estop it from proceeding with the prosecution and also that the Government's failure to disclose the Krogman letter violated the rule expressed in *Brady* v. *Maryland*, 373 U.S. 83 (1963).

On July 7, 1982, the District Court denied Petitioner's Petition for a Writ of Error Coram Nobis. The Court found no legal basis for the estoppel argument and expressed the belief it would have found Petitioner guilty even if the Court had been aware of the Krogman letter, stating:

> In finding Petitioner guilty under 18 U.S.C. § 922(m), the court adopted the reasoning in *United States v. Scherer* . . . and found that a federally licensed firearms dealer must comply with the record keeping requirements when selling firearms from his personal collection. Petitioner also was found guilty of a violation of 18 U.S.C. 922(c) which provides that a "licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer or dealer)" only if the dealer obtains a sworn statement of intent from the transferee or delays delivery of the firearms for at least seven days. Certainly the Krogman letter does not address *the requirements of a statement of intent or delay when weapons are sold away from business premises* and therefore the Court's finding of Petitioner's guilt under 18 U.S.C. § 922(c) would remain unchanged.[6] (App. C, *infra*, 16a) (emphasis added)

The Court, in its opinion, also referred to a letter to Government counsel dated April 7, 1980, from the then Director of the BATF, G. R. Dickerson, which stated

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[6] This statement clearly reflects Judge Murray's erroneous belief that a federally licensed firearms dealer is permitted to do business as a dealer away from his business premises.

that Mr. Krogman's conclusion about the disposition of personal firearms was incorrect (App. L, *infra*, 62a). The Government had placed the letter in evidence, together with an enclosure to the letter, an ATF document identified as ATF P 5300.15 (5/78) entitled "Federal Firearms Licensee Information." In his letter, Mr. Dickerson specifically relied on a sample firearms acquisition and disposition record with sample entries as illustrating ATF's position that a federal licensee's disposition of personal firearms must be recorded. The sample entry, however, deals with the sale of a firearm by a dealer to an out-of-state policeman and refers dealers to instructions on sales to law enforcement officers.

The Fourth Circuit affirmed Petitioner's conviction on April 12, 1983, with Chief Judge Winter dissenting. (App. A, *infra*, 1a-10a) A Petition for Rehearing was denied on July 15, 1983. (App. B, *infra*, 11a-12a) In affirming Petitioner's conviction, the Fourth Circuit rejected the distinction between sales made from a dealer's private gun collection instead of his business inventory, relying on *Scherer*, *supra*, and *United States* v. *Currier*, 621 F.2d 7 (1st Cir. 1980), which also relied upon *Scherer*.[7] The Court further held that since 18 U.S.C. 922(c) "allows a licensed gun dealer to sell a weapon to a person who does not appear at his business premises if various reports are made," Petitioner was properly indicted under this section. (App. A, *infra*, 6a) The Fourth Circuit said it agreed with the District Court's finding that Petitioner did not rely on the advice received by an "unidentified BATF Agent"[8] concerning recording require-

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[7] In following *Scherer*, the First Circuit stated, "This holding is without doubt correct; otherwise, the federal regulations could be circumvented altogether by dealers who were slick enough to establish 'personal collections' for otherwise unlawful sales." 621 F.2d at 9. There were no charges based on 18 U.S.C. 922(c) in either the *Scherer* case or the *Currier* case.

[8] The Bureau could have identified the agent through its records if it had wished to controvert Petitioner, who testified concerning this advice on April 7, 1978, at the suppression hearing. He said

ments since, although he failed to record the sales to Schoen, he did record some sales of personal firearms. The Court did not identify these sales.[9] The Court also rejected any reliance on the letter from Acting Director Krogman, stating that "it is only an interpretation of the law and not a fact material to issues of guilt or punishment." (App. A, *infra*, 7a) The Court also concluded that "the recorded conversations and stipulated facts" were determinative of Petitioner's guilt or innocence. (App. A, *infra*, 7a)

The Fourth Circuit also rejected Petitioner's contention that the warrant was unsupported by probable cause, stating that the affidavit detailed a series of weapons transactions and related a telephone conversation which raised the prospect of further sales without the furnishing of completed forms.[10] Finally, the Court found that the "description of the items set forth in the warrant fell within the 'margin of flexibility' necessary for meeting the injunction of specificity under the Fourth Amendment." (App. A, *infra*, 8a)

## REASONS FOR GRANTING THE PETITION

1. This case raises an extremely important question concerning the construction of the Gun Control Act of 1968, since the Fourth Circuit's holding could undermine one of the most important features of the congressional

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the conversation took place six or eight months after he got his license when the agent came to inspect his records and inventory. (App. O, *infra*, 68a)

[9] In its opinion, the Fourth Circuit mentions pointedly, on several occasions, that Petitioner failed to, or did, record sales to Schoen in his "personal weapons log." The impression is therefore given that the Court may have been under the erroneous belief that this log was an official record or that Petitioner was required to record sales in the log.

[10] The Court apparently failed to appreciate that the transcript of the December 6, 1977, telephone conversation did not confirm Schoen's statement as reported in McMonagle's affidavit, but disagreed with it. See footnote 5, *supra*.

scheme embodied in the Act, and the regulations prescribed pursuant to it: the requirement that a licensed federal firearms dealer conduct business only at the premises specified in his license. Under the holding of the Fourth Circuit, licensed federal firearms dealers could become itinerant mechants, moving from place to place, such as at gun shows, to market their wares, provided a Form 4473 was completed for each firearm sold. This places the Fourth Circuit squarely in conflict with the Second Circuit, which held in *United States v. Ruisi*, 460 F.2d 153 (1972) that a federal firearms dealer, licensed to do business at one premises, could be convicted of engaging in the business of dealing in firearms without a license if he sold firearms at another location. That case, like the instant case, involved sales at a gun show by a dealer licensed to do business at a location other than the gun show.

The Fourth Circuit's decision is based upon a fundamental misinterpretation of the Gun Control Act, encouraged by reliance upon the seriously flawed opinion of the Seventh Circuit in *Scherer*, *supra*. The fundamental misinterpretation is in the conclusion that a licensed federal firearms dealer may engage in business at locations other than his licensed premises, provided that he maintains certain records. To reach this conclusion, the Fourth Circuit misinterpreted the phrase "a licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises," contained in 18 U.S.C. 922(c), to mean that a licensee may leave his business premises to make sales. This section contemplates, however, as is clear when it is read in conjunction with other sections of the Gun Control Act and accompanying regulations, that the licensee remain at his premises but be authorized to sell to nonlicensee customers who do not appear in person at the premises. 27 C.F.R. 178.96 This is the reason that Part II of Form 4473, which must be completed when a § 922(c) sale is made, is labeled by BATF as applicable to "mail order" sales and "Non-Over-

The-Counter" sales as distinguished from "Over-The-Counter" sales.[11]

Petitioner's convictions under Counts One through Four and also Count Seven, are based upon allegations that he failed to comply, when he sold five firearms to Schoen, with 18 U.S.C. 922(c), which compliance is accomplished by completing Part II of Form 4473, relating to non-over-the-counter or mail order sales. On the other hand, his conviction on Counts Eight through Twelve, in connection with the same five sales, are based on allegations that he failed to comply with 18 U.S.C. 923(g) and 27 C.F.R. 178.124(a), which compliance is accomplished by completing Part I of Form 4473, relating to over-the-counter sales. The inconsistency in the Government's theory of its case is not, however, its only fatal deficiency since, even if Petitioner had completed either Part I or Part II of Form 4473 for the sales at the gun shows, he would have been subject to prosecution for dealing in firearms without a license, in accordance with the holding in *Ruisi, supra.* In that case, the president and an employee of a corporation which was licensed to deal in firearms at two stores in Manhattan, New York, sold eleven guns at a weekend gun show in a union hall on Long Island. They required each purchaser to fill out Form 4473. Neither individual nor the corporation had a license to deal in firearms at the union hall where the show was held nor, as the Second Circuit pointed out, would it have been possible for them to obtain such a license. The district court, after a non-jury trial, ruled

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[11] Under the terms of 18 U.S.C. 922(c), these mail order sales are permitted only "[i]n any case not otherwise prohibited" by the Act. A licensee could not, therefore, for example, make a mail order sale to a person who resides in a state other than the licensee's. The requirements that the buyer furnish an affidavit and that the chief law enforcement officer where the buyer resides be notified of the purchase, are obviously substitutes for the ordinary methods used to identify a buyer, when he appears in person at a dealer's premises to purchase over-the-counter.

that the defendants "on behalf of the corporation were engaged in the sale of firearms at that [gun] show, and thus violated the statute [18 U.S.C. 922(a)(1)] by engaging in the business of dealing in firearms without a license." The Court of Appeals affirmed, holding that the record contained overwhelming evidence to support the district court's finding. 460 F.2d at 155.

The decision in *Ruisi* comports with the fixed premises scheme evident from an examination of 18 U.S.C. 922(a), which makes it unlawful to deal in firearms without a license; 18 U.S.C. 923(a), which requires a separate license for each premises; 18 U.S.C. 923(g), which permits warrantless inspection of the dealer's licensed premises; and 18 U.S.C. 923(h), which requires that the dealer's license be posted on the premises.

Moreover, 27 C.F.R. 178.50 provides in pertinent part:

> **Locations Covered by License**
>
> The license covers the class of business or the activity specified in the license at the address described therein. Accordingly, *a separate license must be obtained for each location at which a firearms or ammunition business or activity requiring a license under this part is conducted; however, no license is required to cover a separate warehouse used by the licensee solely for storage of firearms or ammunition* if the records required by this part are maintained at the licensed premises served by such warehouse. . . . (emphasis added)

Further, BATF has clearly informed dealers, through its publication, *your 1977 guide to—Firearms Regulations*, published for the benefit of dealers, that sales away from their licensed premises, such as at gun shows, are not permitted by the Gun Control Act. Revenue Ruling 69-59 also emphasizes that "a licensee may not sell fire-

arms or ammunition at a gun show held on premises other than those covered by his license."

The actual holding in *Scherer, supra*, upon which both the District Court and the Fourth Circuit relied to sustain Petitioner's conviction, is not as broad as those courts believed. Sherer was convicted of failing to maintain a Firearms Acquisition and Disposition Record and failing to complete Form 4473 in connection with certain sales of firearms. In describing Scherer, the Seventh Circuit said that he was a licensed firearms dealer who "maintains an office connected to a barn on his property from which he is licensed to conduct his firearms business" in Hampshire, Illinois. 523 F.2d at 371. A Government informant purchased four firearms from Scherer and "[n]one of these transactions occurred at Scherer's formal business office. . . ." *Id* at 371. Scherer alleged that he was exempt from the recording provisions of the Gun Control Act because the sales listed in the indictment occurred at locations other than his licensed business premises. Three sales occurred inside Scherer's house, while the transfer of a fourth firearm took place at a gun show in Palatine, Illinois. Since he was not licensed to deal at any of the locations mentioned, Scherer argued that he was not a federally licensed firearms dealer as to those places and thus not subject to the record keeping requirements. To this argument, the Seventh Circuit replied:

> *Initially, we cannot agree that all of the gun sales did not occur on Scherer's business premises.* The house where the bulk of these transactions took place was a mere eighty feet from the defendant's office and located on the same property. Scherer's status as a licensed firearms dealer and the responsibilities that attend to that title do not end with a mere step outside the door. (emphasis added)

The Seventh Circuit thus found that the sales in the *Scherer* case were made on the premises at which Scherer

was licensed to deal in firearms. Under such circumstances, it is clear that his sales of firearms were subject to the record-keeping provisions of the Gun Control Act. It is equally clear that under those circumstances the Seventh Circuit's holding did not have the effect of authorizing itinerant dealing in firearms, as does the Fourth Circuit's decision in this case. It was therefore *dictum* when the *Scherer* court decided that a licensed dealer was required to record the disposition of a firearm owned in his private capacity, when the disposition is made away from his business premises. 523 F.2d at 374.

2. It is imperative that the Government and the Courts of Appeals receive the guidance of this Court concerning the proper construction of the technical record-keeping provisions of the Gun Control Act. The First Circuit in *Currier*, *supra*, and now the Fourth Circuit in the instant case, have adopted *Scherer's* shallow reasoning and it is apparent that the Government will continue to initiate prosecutions based on the same reasoning. It is also apparent, from an examination of the recordkeeping provisions of the Gun Control Act, that such felony prosecutions are without legal justification.

18 U.S.C. 923(g) and its accompanying regulations require that records of acquisition and disposition be kept by licensed importers, manufacturers, and dealers to identify the firearms in their possession. The possessor of each firearm handled by a licensee, until its first disposition by a dealer, can therefore be ascertained from licensee records. Paragraph One of Industry Circular 72-30 (distributed to licensed dealers by BATF) recognizes this scheme and the consequence thereof, i.e., that the Gun Control Act ordinarily requires a dealer to enter into his records any firearm on his licensed premises since the business is in possession of the firearm and its records should reflect that fact. The Circular, therefore, sets out a means by which a licensed dealer can show the distinction between firearms not for sale by the business and

those which are for sale, so that personal firearms will not be considered acquisitions by the business, despite their presence on the business premises. When so distinguished, by being segregated and identified as personal firearms, they need not be entered in the dealer's records.

Paragraph Two of the Industry Circular further emphasizes the distinction between business and personal firearms. It provides that when a dealer uses his license to acquire a firearm, even though destined for his personal collection, the business is shown in the records as the entity which made the "acquisition" of the firearm. Thereafter, the dealer may record a subsequent "disposition" to himself and take possession of the firearm in his "private capacity." Thus, the chain of physical possession of the firearm is recorded in conformity with the Gun Control Act. This is a clear recognition of the Act's important distinction between firearms possessed by the business of the dealer and those possessed in his private capacity. Were there no such distinction, there would be no need to record the disposition by the business to the dealer in his "private capacity" or to prepare the Form 4473 showing the transfer.[12]

Similarly, nothing in the Act suggests that after the disposition to "himself in his private capacity" the dealer, in his private capacity, has fewer rights with regard to the firearm than any other private person, including the right to sell the firearm. Just as any other private party may transfer a firearm to another private party residing in his state, without a record being made of the transaction by a dealer, so may a dealer when acting in his private capacity. An individual, in other words, acquires certain privileges by becoming a licensed dealer but does

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[12] The Form 4473 must be prepared by the dealer since his business must treat "himself in his private capacity" as the business would treat any other transferee. The firearms involved in this case, however, were never a part of Petitioner's business inventory but were always possessed by Petitioner in his "private capacity."

not forfeit any of the individual rights he may exercise in his private capacity. This distinction between business inventory and personally owned firearms is also recognized by the letter dated 30 July 1979 from then Acting Director John G. Krogman to Senator Hayakawa, *supra*. (App. K, *infra*, 56a-61a)

The answer to an objection that a "slick" dealer might transfer many, or perhaps all, firearms from the business to himself in his private capacity and then make unrecorded sales of them *at his business premises*, is that such a dealer would be subject to prosecution under the Act for failure to enter such firearms into his business records as acquisitions because firearms possessed by the dealer on his business premises *for sale* must be entered in his records. Moreover, when such firearms are disposed of, their disposition by the business must be recorded, thereby subjecting the dealer to prosecution if he fails to record the disposition. If a dealer sold or otherwise transferred firearms in his private capacity *away from his business premises*, and the firearms had either been originally acquired by him in his private capacity or disposed of to himself by his business, he would be subject to prosecution for selling firearms without a license in violation of 18 U.S.C. 922(a)(1).[13] He could not defend his actions by relying on the fact that he possessed a license since 18 U.S.C. 923 and 27 C.F.R. 178.50 require that a separate license be obtained for each location at which a firearms or ammunition activity requiring a license is conducted.

The decision in *Scherer* also is incorrect because the distinction between "personal" and "business" transactions, far from being arbitrary, as the Seventh Circuit stated, is one of the Act's most important distinctions.

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[13] This is the point that the First Circuit failed to grasp in *United States* v. *Currier*, *supra*, when it suggested that "slick" dealers could establish personal collections for otherwise unlawful sales. (Footnote 7, *supra*)

Indeed, this distinction is recognized in paragraph Two of Circular 72-30, which *Scherer* did not quote, even though it set out paragraph One in full. Moreover, it simply does not comport with the history, purpose, or internal logic of the Act to hold that the mere selling of a firearm brings it and the parties involved within the purview of the Act. Indeed, once a firearm is disposed of to a nonlicensed person, the Act's record-keeping requirements for that firearm have been satisfied and the nonlicensed individual need not make a record of any subsequent disposition, nor is he required to make the transaction through a licensed dealer, to ensure that there is a record of it. Although, as *Scherer* stated, the statutes and regulations refer to "any firearm" and "each disposition," it is evident from the text of 18 U.S.C. 923(g) and 27 C.F.R. 178.124 and 178.125 that "any firearm" refers to any firearm possessed by the business and "each disposition" refers to each disposition by the business.

The *Scherer* court's statement at p. 374 that "it is immaterial whether the weapons sold were originally acquired for Scherer's personal use or for business purposes" misses the point. The purpose of the acquisition is not the governing factor but rather the status of the firearm at the time of the transaction, i.e., whether it was possessed by the business or by the dealer in his private capacity. Nor is it accurate, as the *Scherer* court said, 523 F.2d at 374, that the firearms "became a part of [Scherer's] business inventory the moment they were placed on the market for resale." Rather, as Circular 72-30 correctly recognizes, a firearm is no longer part of the business inventory once it has been disposed of to a private party and the disposition recorded. A firearm, moreover, does not revert to business inventory when the dealer, in his personal capacity, offers it for sale away from his premises. Once a dealer has transferred a firearm from his business to himself in his personal capacity, for the firearm again to become part of the inventory it

would have to be transferred and recorded as an acquisition on the dealer's records or be physically possessed on the business premises without being segregated and identified as a personal firearm.

Applying these principles to the instant case, it is evident that Petitioner was not required to make or maintain records of the five sales which form the basis of the charges against him. Since the firearms never became part of his dealer inventory, he was never under any legal obligation to record their sales in his dealer records. Of course, because the firearms sales were made in Maryland between Maryland residents, they were perfectly legal in all other respects.

3. The Fourth Circuit's holding in this case is directly in conflict with the Ninth Circuit's decision in *United States v. Cardwell*, 680 F.2d 75 (9th Cir. 1982). In this case, the warrant commanded, tracking the language of 18 U.S.C. 924(d), that agents seize "firearms, ammunition and records involved in, used in or intended to be used in violation of Title 18 U.S.C. Section 922(m) and 922(c)." Similarly, the warrant in *Cardwell* authorized the seizure of books and records "which are the fruits and instrumentalities of violations of 26 U.S.C. § 7201." In holding the warrant insufficiently particular, the Ninth Circuit observed that " 'limiting' the search to only records that are evidence of the violation of a certain statute is generally not enough." 680 F.2d at 78. The Ninth Circuit concluded, therefore, that "[i]f items that are illegal, fraudulent, or evidence of illegality are sought, the warrant must contain some guidelines to aid the determination of what may or may not be seized." *Id.* In stark contrast, the Fourth Circuit, in upholding warrants virtually identical to that in *Cardwell*, concluded that the "description of the items set forth in the warrant fell within the 'margin of flexibility' necessary for meeting the injunctions of specificity under the Fourth Amendment." (App. A, *infra*, 8a) Thus, in

conflict with the Ninth Circuit, the Fourth Circuit has approved warrants wherein the language used to describe the items to be seized is merely a generic directive framed in the language of a particular statute.[14] In doing so, the Fourth Circuit has decided, in effect, that, contrary to the commands of the Fourth Amendment, the determination of what items are to be seized may be left to the "discretion of the officer executing the warrant." *Stanford v. Texas*, 379 U.S. 476, 485 (1965), *quoting Marron v. United States*, 275 U.S. 192, 196 (1927).[15] Indeed, the warrant approved by the Fourth Circuit's decision effectively required the seizing agents to investigate to determine whether 18 U.S.C. 922(c) had been violated, and then to determine which items had been used in past violations and which were intended to be so used in the future. *Cardwell* specifically disapproved this type of "massive reexamination" after the Government had already conducted an investigation of its case. 680 F.2d at 78.

4. In interpreting the Due Process Clause of the Fifth Amendment, this Court has uniformly held that due process of law is violated when a citizen is convicted "for exercising a privilege which the state had clearly told him was available to him." *Raley v. Ohio*, 360 U.S. 423, 426

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[14] This is not to say that all warrants which describe property in generic terms are invalid; rather, it is only those warrants which frame the generic description in terms of a statute which must fail since such warrants require the executing officer to make an on-the-scene legal determination of what items are to be seized.

[15] The warrant in this case also fails from a lack of probable cause if it is determined that Petitioner did not violate 18 U.S.C. 922(c), since McMonagle's affidavit in support of the issuance of the warrant was based entirely on facts supporting the theory that the sales by Petitioner to Schoen violated 18 U.S.C. 922(c). The affidavit was also inadequate to establish probable cause because it was factually incorrect in avering that Schoen told Petitioner, during their telephone conversation of December 6, 1977, that he would be in the market to buy more firearms "off paper," the statement that was the linchpin of the affidavit.

(1959). Likewise, in *Cox v. Louisiana*, 379 U.S. 559 (1965), where the defendant was convicted for engaging in activity which the police had previously told him would not be in violation of law, this Court held that the "Due Process Clause does not permit convictions to be obtained under such circumstances." 379 U.S. at 571. In reaching this conclusion, this Court has not suggested that a defendant must, in instances unrelated to the charges against him, have relied on the advice he received; indeed, because *Raley* and *Cox* were concerned with the question of fundamental fairness, those decisions compel the conclusion that the only relevant issue is whether or not the defendant relied upon the advice in the instances which are the subject of the charges against him. Yet, the Fourth Circuit concluded that because Petitioner did not rely on the Government's advice (that it was not necessary to record the sales of the type made to Schoen) with regard to "some sales" of personal firearms unrelated to this case, that he "did not in fact rely upon this purported counseling" when making the sales to Schoen. (App. A, *infra*, 6a)[16] Aside from the fact that Petitioner's testimony that he relied upon the advice he was given was uncontroverted—indeed, the fact that he received such advice was corroborated by Mr. Krogman's letter—such an interpretation of *Raley* and *Cox* limits those decisions to the degree that they are effectively nullified.

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[16] Indeed, as has already been explained, the advice received, unlike that received by the defendant in *Raley*, was correct. BATF, in *your 1977 guide to*—FIREARMS REGULATION, specifically advised that, at a gun show, an unlicensed resident of the state in which a gun show is held may make an occasional sale of a firearm to another nonlicensee residing in his state as long as he is not "engaging in the business." Petitioner, at the gun shows in Maryland was, of course, a nonlicensee. The *guide* also advised dealers that Form 4473 is required only for sales by a licensee.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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